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No. 662

Supreme Court of the United States

OCTOBER TERM 1939

DAMPSKIBSSELSKABET DANNEBROG, a Corporation, Claimant of the Motorship "Stjerneborg," and AKTIESELSKABET BORGESTAD, a Corporation, Claimant of the Motorship "Brand," *Petitioners,*

vs.

SIGNAL OIL AND GAS COMPANY OF CALIFORNIA, a Corporation, *Respondent,*

UPON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENT

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THE ARGUS PRESS, SEATTLE

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UPON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENT

QUESTIONS PRESENTED

Petitioners urge two reasons for the reversal of the decrees herein. First, that respondent supplier, by entering into a contract with the charterer for the sale to it of fuel oil, waived its right to a lien on the vessels for the fuel supplied. Second, that, because the charters obligated the charterer to provide and pay for the fuel, no lien arose under the Maritime Lien Act of 1910, as amended in 1920, 46 U.S.C. Sec. 971-975.

If the provisions of the charters precluded a lien, then the question of whether the existence of the oil

contract waived the lien is immaterial. We therefore consider first whether the charters prohibited the charterer from incurring a lien against the vessels.

SUMMARY OF ARGUMENT

I.

The Provide-and-Pay-for Provision of the Charter Parties Did Not Withhold From the Charterer Authority to Bind the Vessels.

The oil was supplied upon order of the charterer. The charterer was authorized by the owner to order it. Under the Maritime Lien Act, a lien arose unless the provide-and-pay-for clause in the charter parties withheld from the charterer authority to bind the vessel. Such a provision alone does not withhold the authority. *The South Coast*, 251 U. S. 519. An express denial of authority is essential. *United States v. Carver*, 260 U. S. 482.

It is so held by the Circuit Courts of Appeal in the First, Second, Third, Seventh and Ninth Circuits in cases involving various types of charter parties and contracts. These decisions disclose a preponderance of judicial view that only explicit language denying power to bind the vessel will suffice to prevent the lien.

The decisions in *The Kate*, 164 U. S. 458, and *The Valencia*, 165 U. S. 264, relied on by petitioners, are distinguishable.

The Maritime Lien Act, 46 U.S.C. 971, gives a lien to any person furnishing supplies to a vessel upon the order of a person authorized by the owner, unless, because of the terms of the charter party, the person or-

dering the supply is without authority to bind the vessel therefor. The act, by expressly eliminating the necessity of allegation or proof that credit was given to the vessel, creates a presumption that the supply was furnished on the credit of the vessel.

II.

By Supplying the Oil Under a Standing Contract With the Charterer, Respondent Did Not Waive Its Lien.

The supplier may rely on the credit of both the charterer and the vessel. The lien is not waived unless the supplier relies solely on the charterer's credit, which respondent did not do. The oil contract did not exclude the application of the Maritime Lien Act. That act applied as a necessary incident of the contract. Decisions of the Circuit Courts of Appeal of the First and Ninth Circuits hold that such a contract does not preclude the lien.

ARGUMENT

I.

THE PROVIDE-AND-PAY-FOR PROVISION OF THE CHARTER PARTIES DID NOT WITHHOLD FROM THE CHARTERER AUTHORITY TO BIND THE VESSELS.

The charters here not only authorized the charterer to order the oil, they required the charterer to provide it (R. 116). The charterer ordered the oil. The oil was therefore ordered by one authorized by the owner to order it. The Maritime Lien Act creates the

presumption that it was supplied on the credit of the vessel. The only question, then, is whether the provision in the charters that the charterer should pay for the oil deprived the charterer of authority to bind the vessel therefor.

Since the enactment of the Maritime Lien Act in 1910, and its amendment in 1920, this court has considered but two cases bearing on this question: *The South Coast*, 251 U. S. 519, and *United States v. Carver*, 260 U. S. 482.

Prior to the enactment of the Maritime Lien Act, this court had decided two cases which, it is contended by petitioners, are controlling to the effect that an obligation to provide and pay for supplies deprives the charterer of authority to bind the vessel therefor. These cases are *The Kate*, 164 U. S. 458, and *The Valencia*, 165 U. S. 264.

We submit that this case is controlled by the decisions in *The South Coast*, and *United States v. Carver*, and not by *The Kate* and *The Valencia*.

The South Coast, 251 U. S. 519, concerned a charter wherein the charterer was to provide the crew and pay for all supplies. The master was to be, and was, appointed by the owner, but was under the orders of the charterer.

In the decision in the District Court, 233 Fed. 327, the court pointed out that the mere requirement that the charterers should provide and pay for supplies was not sufficient to deprive him of authority to bind the vessel, but that an express provision in the charter that the charterer was without such authority was essential, saying:

> "And while the owners took every precaution to warn the furnisher of the supplies not to have any of them go on the ship's account, they did not take the essential and fundamental precaution to provide by the terms of the charter that the charterer or the master appointed by him, should be without authority to bind the vessel therefor."

The decision of the District Court was affirmed by the Circuit Court of Appeals for the Ninth Circuit, *The South Coast* (C.C.A. 9, 1917) 247 Fed. 84. The Circuit Court of Appeals again stressed the fact that a mere requirement that the charterer provide and pay for supplies does not deprive him of authority to bind the vessel.

An analysis of the purposes of the Maritime Lien Act and the necessity that the owner expressly withhold from the charterer power to bind the vessel in order to defeat the lien granted by section one of the Maritime Lien Act (46 U.S.C. 971), is so well stated by the Circuit Court of Appeals in *The South Coast*, that we quote from the decision:

> "It is the purpose of the statute, as it was the purpose of the law previous thereto, that the furnisher of such commodities as are necessary to enable a ship to enter upon or pursue her voyage, and to engage in maritime traffic, to which only she is adapted, shall have a lien on the ship therefor. It is in the interest of shipping, conducted upon maritime waters, that such should be the case, as otherwise credit would not be extended, upon the account of the owner or master alone, to enable the ship to discharge its peculiar function, and great inconvenience would follow,

to the detriment and disadvantage, if not the ultimate disaster in large measure, of maritime shipping. Many ships sail under charter, either verbal or in form of regularly drawn charter parties, and it is usual and customary for the charterer in either event to disburse the necessary expenses of the ship; and of this all persons furnishing supplies, etc., to a chartered ship must be deemed to have notice. But notwithstanding this notice, or even knowledge that the ship is under charter, we cannot believe that it was the intendment of the statute or the law that the furnisher should, because of that fact, be deprived of his lien when advancing necessary repairs or supplies in good faith to enable the ship to engage in her accustomed traffic. Nor do we believe that it was the intendment of the statute or of the law thus to impose so vital a hindrance upon maritime shipping, and unless there is something more in the charter party, that unalterably inhibits the master or the charterer from incurring any expenditures on the credit of the ship that may become a lien thereon, the master's ordinary authority is not impaired or abbreviated; nor can the right of the furnisher of repairs, etc., to extend credit to the ship, and his consequent lien, be so subverted."

The judgment of the Circuit Court of Appeals was affirmed by this court in an opinion by Mr. Justice Holmes. *The South Coast*, 251 U. S. 519.

While the decision in *The South Coast* was based somewhat upon the fact that the charter provided that the charterer would save the owner harmless from all liens and expenses that it might be put to in consequence of liens, and that the charterer was to

discharge, within thirty days, any debts which would create a lien upon the vessel, it is to be noted that Mr. Justice Holmes stated:

> "There was nothing from which the furnisher could have ascertained that the master did not have power to bind the ship."

The furnisher could have ascertained that it was the obligation of the charterer to provide and pay for the supplies and that the master was under the orders of the charterer and not the owner, for the charter party so provided. Had this court, in deciding *The South Coast*, considered that the obligation to provide and pay for the supplies withheld from the charterer's master authority to bind the vessel, the court surely would not have stated that: "There was nothing from which the furnisher could have ascertained that the master did not have power to bind the ship," but would have expressed its disagreement with the statements of the district court and the circuit court of appeals that an express withdrawal of the authority was essential.

The First, Second, Third, Seventh and Ninth Circuit Courts of Appeal hold that a charterer, conditional vendee, or managing agent required by a charter party or contract to procure and pay for supplies, repairs, etc., is not, by such requirement alone, deprived of authority to bind the vessel.

First Circuit: *The Everosa* (1937) 93 F. (2d) 732:

> Time charter provision: "That the charterer shall provide and pay for all coals." 18 F. Supp. 186, p. 189—no provision prohibiting charterer from incurring lien.

Second Circuit: *The J. W. Hennessy* (1932) 57 F. (2d) 77:

> Demise charter provision: Charterer " 'at its own expense' to 'operate, man, furnish all the fuel, supplies, labor, and all costs necessary to operate the same.' There was no clause in the charter that the charterer had no right or authority to pledge the credit of the vessels or to impose any liens upon them." 57 F. (2d) 77.
>
> The court said: "Here, as in the *South Coast*, the charter party, while providing that the charterer should pay for all expenses, did not exclude the power of the charterer to bind the vessel."
>
> "In the absence of a clause doing this (excluding charterer's right to create a lien), the Dalzell company was given a presumptive lien for towage."

Third Circuit: *The Anna E. Morse* (1922) 286 Fed. 794, cert. den. 262 U. S. 759:

> Contract provision: " 'the agent' agreed to provide and pay for all provisions, equipment and supplies." 286 Fed. 798.
>
> The court said: "In searching this contract for lack of authority on the part of the Transport Company to procure supplies on the credit of ships assigned to it, the libelants would have found no provision whereby the United States, as owner, had withheld authority from the Transport Company to procure supplies for the ships it had intrusted to its management."

Seventh Circuit: In *Munson Inland Water Lines v. Seidl* (1934) 71 F. (2d) 791, the Seventh Circuit considered a conditional sales contract which required the purchasers to keep the vessels free and clear of liens. The court found the contract to be

unlike that in either *The South Coast* or *United States v. Carver*, and reached this conclusion:

> "We are convinced that an agreement, to exclude liability for liens created by the master, must be so worded as to necessitate the construction that a lien may not be created. In short, the agreement must *expressly deny* to the vendee authority to create a lien." (Emphasis by the court.) 71 F. (2d) p. 793.

Ninth Circuit: *The Golden Gate*, 52 F. (2d) 397, cert. den. 284 U. S. 682.

> Time charter provision: "In the instant case the charter party contains a provision requiring the charterer to provide and pay for all fuel oil, but contains no express provision denying the right of the charterer to bind the ship for supplies."
>
> The court said: "In view of the fact that in the instant case the charter did not prohibit the charterer from creating liens, it is immaterial whether or not the libelant knew or should have known its terms."

Only one Circuit Court of Appeals has held that the provide-and-pay-for provision standing alone deprives the charterer of authority to bind the vessel, the Circuit Court of Appeals for the Fifth Circuit, *The Cratheus* (1920) 263 Fed. 693. It is to be noted, however, that in *The Cratheus* there was no claim that under the law as it was before the enactment of the Maritime Lien Act a lien would have arisen, the court saying:

> "It is not claimed that under the law as it was before the enactment of the Act of June 23, 1910, 'relating to liens on vessels for repairs, supplies, or other necessaries' (36 Stat. 604 [Comp. St.

Sec. 7783-7787]), the coal was so furnished as to give a lien on the vessel."

As pointed out by the Circuit Court of Appeals for the Ninth Circuit, in *The Golden Gate*, 52 F. (2d) 397, the charterer was, however, prior to the enactment of the Maritime Lien Act, authorized to create liens on a chartered vessel because he is a person to whom the management of the vessel at the port of supply is intrusted.

In *The Golden Gate* the court said:

> "* * * By the provisions of 46 U.S.C.A., sections 972, 973, *supra*, the charterer is authorized to create liens on the chartered vessel for necessary supplies furnished it, because it is a 'person to whom the management of the vessel at the port of supply is intrusted.' This was the rule before the above-mentioned statute was enacted, and the courts have since recognized this power of the charterer. *The India* (D. C.) 14 F. 476, 478; *The Lime Rock* (D.C.) 49 F. 383, 384; *The George Dumois* (C.C.A.) 68 F. 926, 929; *The George Farwell* (C.C.A.) 103 F. 882; *The City of Milford* (D.C.) 199 F. 956; *Thomas W. Rogers* (C.C.A.) 207 F. 69; *The Yankee* (C.C.A.) 233 F. 919; *The Oceana* (C.C.A.) 244 F. 80, 83; *The Penn* (C.C.A.) 276 F. 118."

The cases cited support the statement. They concerned: a voyage charter, *The India* (D.C.S.D.N.Y., 1882) 14 Fed. 476; time charter, *The George Demois* (C.C.A. 5, 1895) 68 Fed. 926, and *The George Farwell* (C.C.A. 2, 1900) 103 Fed. 882; an agreed purchaser, *The City of Milford* (D.C.Md. 1912) 199 Fed. 956; and a bailee for hire whom the court considered

as an owner *pro hac vice*, *The Lime Rock* (D.C.N.J. 1892) 49 Fed. 383.

The Fourth Circuit case of *The Mona*, 282 Fed. 468, has been cited as holding that a simple provision that the charterer provide and pay for withholds authority to bind the ship (66 F. (2d) 997, 998). The case concerned the question whether towage was, prior to the amendment of the Maritime Lien Act in 1920, a necessary. The question of the effect of a charter provision requiring charterer to provide and pay for was not discussed by the court. The court held that: "The manner of business between the libelant and the Caravel Steamship Company (charterer) shows that it was never intended that this bill was to be asserted against the bark."

There has been considerable confusion in the district courts as to whether a provide-and-pay-for clause withholds power to incur the lien. No one case nor text writer or law journal lists all the cases or details the particular facts of each. *The Luddco 41* (C.C.A. 9) 66 F. (2d) 997, lists parts of the cases. The Second Circuit case, *The J. W. Hennessy*, 57 (2d) 77, refers to many of them.

Many of the district court opinions refer only to one line of cases, as for example *The Ben Lawers* (D.C. W.D. Wash.) 42 F. (2d) 897, opinion by the Idaho district judge, in which the court apparently took no notice of the decision of the Circuit Court of Appeals in *The Portland*, 273 Fed. 701. The decision is in any event overruled by *The Golden Gate*, 52 F. (2d) 397, and *The Luddco 41*, 66 F. (2d) 997.

In *The Pajala*, 7 F. Supp. 618, the Eastern District

of New York was manifestly uncertain but thought that *The Thordis*, 290 Fed. 255, which denied a lien, and *The J. W. Hennessy* (C.C.A. 2) 57 F. (2d) 77, which sustained one, were distinguishable on the ground that the one concerned a time charter and the other a demise charter although in *The J. W. Hennessy* the court referred to *The Golden Gate*, a time charter case, as in line with its decision. *The Pajala* has the further element that the charterer took on enough bunkers "to have on board on redelivery a profitable allowance" as provided in the charter.

44 Yale Law Journal 697, at page 700, gives a partial list of the cases, and concludes:

> "* * * it would seem desirable that the Supreme Court recognize the existence of this conflict of authority and interpret ambiguous provisions of this sort as permitting the imposition of a lien."

The cases in the Circuit Courts of Appeal are not controlling on this court. They do, however, disclose the overwhelming view of the Circuit Courts of Appeal that a simple provide-and-pay-for provision does not deprive the charterer of power to bind the vessel.

As stated in the decision of the Circuit Court of Appeals in these cases:

> "The owners are not without a means of protection. 46 U.S.C.A. section 973." (R 226)

Petitioners, as did owners in *United States v Carver*, 260 U. S. 482, could easily have prevented the attachment of liens by the simple expedient of inserting in the charters a provision that the charterer might not incur liens.

As stated by Professor Robinson in his recent Hornbook—Robinson on Admiralty, p. 394:

> "Only explicit language denying the power, therefore, will serve."

See also the author's note, p. 635, as to custom of owners to protect vessels against liens.

As five Circuit Courts of Appeal have held that a provide-and-pay-for clause does not withhold the charterer's authority to incur a lien as against one holding that it does, the clause cannot be said to clearly withhold the authority. It may be, as stated in 44 Yale Law Journal, 697, 700 *ante* p. 12, that the charter provisions are ambiguous. If so, they should be interpreted by this court most strongly against the owners who could have removed any question by using explicit language denying the power, as in *United States v. Carver*, 260 U. S. 482.

It is contended by petitioners, however, that this court, in its decisions in *The Kate* (1896) 164 U. S. 458, and *The Valencia* (1897) 165 U. S. 264, decided prior to the enactment of the Maritime Lien Act, held that the simple provision in the charter that the charterer should provide and pay for supplies deprived the charterer of the power to bind the vessel therefor and that those decisions require a reversal.

This court has not interpreted its decision in *The Kate* and *The Valencia*. The decisions have been interpreted, however, by the Circuit Court of Appeals for the Ninth Circuit, in *The South Coast*, 247 Fed. 84, and by the Circuit Court of Appeals for the Second Circuit, in *The J. W. Hennessy*, 57 F. (2d) 77,

both courts sustaining liens although the charterer was obligated to provide and pay for supplies.

In *The South Coast*, 247 Fed. 84, the Circuit Court of Appeals for the Ninth Circuit said:

> "*The Kate* and *The Valencia* related to supplies furnished upon the order of a charterer and prior to the passage of the Merchant Marine Act. We think that act as construed in *The South Coast* precluded the application of these decisions to the case at bar and subjected the claimant's vessels to a lien for towage because the charter party did not exclude the charterer's power."

In *The J. W. Hennessy*, 57 F. (2d) 77, the Circuit Court of Appeals for the Second Circuit said:

> "In *The Ka* [illegible] coal, for the price of which the lien was filed, was furnished to the charterer under circumstances indicating, as was said in the *Surprise*, 'that there was never any expectation of holding the vessel' * * *
>
> "The case practically hinged upon the condition that there was an element of fraud in the transaction of claiming the lien, to which the libelant was a party. *The Valencia* is an analogous case."

That *The Kate* did practically hinge upon the element of fraud is disclosed by the fact that Mr. Justice Harlan, who wrote the opinions in both cases, emphasized the statement in *The Kate* that:

> "The principle would seem to be firmly established that when it is sought to create a lien upon a vessel for supplies furnished upon the order of the master, the libel will be dismissed if it satisfactorily appears that the libelant knew, or ought reasonably to be charged with knowledge, that

there was no necessity for obtaining the supplies, or, if they were ordered on the credit of the vessel, that the master had, at the time, in his hands, funds which his duty required that he should apply in the purchase of needed supplies."

We submit that these interpretations of the decisions in *The Kate* and *The Valencia* are correct. In *The Kate* this court stated that the coal was not required in the interests of the owners at the time it was furnished, for the agent of each vessel had sufficient funds in hand or could have obtained them upon the credit of the vessel, to supply the coal for any given voyage. It reached the conclusion that the attempt to hold the vessel liable was in bad faith to the owner. The cases cited by the court are all cases where it appeared that the master had sufficient funds on hand to pay for the necessities.

The Valencia, as stated by the Circuit Court of Appeals for the Second Circuit in *The J. W. Hennessy*, 57 F. (2d) 77, was an analogous case. This court in *The Valencia* expressly reserved the question of whether a charterer obligated to provide and pay for necessary supplies was without authority to bind the vessel, saying:

> "Under what circumstances, if under any, a charterer who has control and possession of a vessel under a charter party requiring him, at his own cost, to provide for necessary supplies and repairs, may pledge the credit of the vessel, it is not necessary to determine."

It must also be remembered that *The Kate* and *The Valencia* were decided prior to the Maritime Lien Act when proof was necessary that the supply was on the

credit of the vessel. The decisions in both cases, particularly *The Valencia*, were influenced by that factor for, states Mr. Justice Harlan in *The Valencia*, 165 U. S. 265, 266:

> "No fact proved in the case warranted the inference that either the master or the charterer agreed to pledge the credit of the vessel."

If a simple charter provision that the charterer provide and pay for deprived the charterer of authority to pledge the credit of the vessel, then any agreement to pledge it would be ineffective. By specifically noting the absence of any such agreement, it is evident this court in *The Valencia* did not consider that a provide-and-pay-for clause alone deprived the charterer of authority to bind the vessel.

II.

BY SUPPLYING THE OIL UNDER A STANDING CONTRACT WITH THE CHARTERER, RESPONDENT DID NOT WAIVE ITS LIEN.

It is well settled that the supplier may rely on the credit of both the orderer of the supply and on the credit of the vessel. *Piedmont & George's Creek Coal Co. v. Seaboard Fisheries Co.*, 254 U. S. 1. In that case there was a contract for future supply: "the Piedmont & George's Creek Coal Company * * * agreed to furnish the Oil Corporation such coal as it would require during the season of 1914." The decision in the case was that no lien arose because the coal

was not supplied to the vessels. The fact that the oil was supplied under a standing contract would not have defeated the liens for, said the court:

> "The difficulty which confronts the Coal Company does not lie in the fact that the contract for the coal was made with the Oil Corporation.
>
> * * * * * * *
>
> "Likewise, the fact that the coal which was supplied to the several vessels had been purchased under a single contract presents no difficulty."
>
> * * * * * * *
>
> "If the coal had been furnished to the several vessels by the libelant, maritime liens would have arisen and could have been established under the statute without proof that credit was given to the vessels."

If the supply is furnished on a cash basis there is no debt and consequently no lien. A lien arises only when there is a purchase on credit. The vessel itself can not be a buyer. Supplies can be bought only by persons.

No supplier expects when supplying a vessel that he will have to foreclose his lien. Unless the supply is for cash, the supplier is, in the first instance, relying on the person ordering the supplies. The facts that the oil here was bought by the charterer and under a contract which allowed certain time for payment, and that further deliveries might be refused if he did not pay, do not negative the presumption created by the statute that the supply was on the credit of the vessel.

The lien is not waived by reliance on the credit of the one ordering the supply, but only when it appears

that the orderer was to be exclusively liable for payment.

In *The Bronx* (C.C.A. 2, 1917) 246 Fed. 809, the rule is stated to be:

> "The lien is presumed on proof of due delivery on request of lawful supplies, until such presumption is destroyed by affirmative proof of agreement that the promising party was to be exclusively liable for payment."

There is nothing in the contract here to the effect that the promising party was to be exclusively liable for payment.

That respondent was not waiving the lien is established by the following facts and circumstances:

Respondent treated each delivery as a separate transactions. It did not carry the items as a running account (R. 71, 76, 81). The receipts were made out to the vessel and owners (R. 101, 104, 111). Bills and invoices were to the vessel and owners (R. 101, 105, 113). No action was taken on the charterer's offer to assign its collect freights to secure the price of the oil (R. 76) (Record does not disclose anything done on the offer).

All of these acts by respondent would have been inconsistent had respondent been looking only to the credit of the charterer. Furthermore the charterer considered that the accounts were against the vessels (R. 67) "We are now in receipt of your account against the 'Hoegh Trader' * * *."

It is immaterial that respondent knew that the Stjerneborg was under time charter (R. 94), or as far as the record discloses, had no knowledge of any

agreement on the Brand prior to the time the oil was on board, except as disclosed by Comyn's (the charterer's) letter ordering the supply, that "Messrs. Swayne & Hoyt, Ltd., will be acting as agents and if you will keep in touch with them they will be able to advise as to the time and place they will require the oil barge to be put alongside" (R. 102).

The master of the Stjerneborg did not endorse the delivery tickets "For time charterer's account" (R. 111). The chief engineer of the Brand did (R. 100, 104). These circumstances served only to notify respondent, in the one case before, and in the other case after, the oil was in the bunkers, that the vessels were under a time charter of the same kind as had been theretofore held by the Circuit Court of Appeals which covers the entire Pacific Coast, did not withhold the charterer's authority to bind the vessel.

The Portland (C.C.A. 9, 1921) 273 Fed. 401;

The Golden Gate (C.C.A. 9, 1931) 52 F. (2d) 397;

The Luddco 41 (C.C.A. 9, 1933) 66 F. (2d) 997.

Petitioners argue at length that the oil contract excluded the application of the Maritime Lien Act because the contract stated that it contained the entire contract and that it should be governed by the laws of the state of California.

The fact that the contract may have recited all that the contracting parties agreed upon does not exclude the application of legal rights and liabilities which inure in the contract. The contract as a matter of fact was silent on many matters. It contained no

provision as to how or where orders should be placed, no requirement that the deliveries should be receipted for, no provision as to manner of billing, no provision that respondent supplier might sue the charterer for non-payment.

As the contract did not specifically give respondent a right to sue the charterer nor specifically say that the oil was furnished on the credit of the vessel, it would be as logical to claim that respondent could not sue the charterer, as to claim that respondent did not rely on the credit of the vessel. The claim is manifestly untenable. The right to sue the charterer *in personam* would rise because the law gives such rights. Reliance on the credit of the vessel is presumed under the Maritime Lien Act, 46 U.S.C. 971. There was no necessity of reciting in the contract either the legal right or the statutory presumption.

Other details of dealings which might arise under the contract, such as method of ordering, billing, were left open and subsequently arranged by letter or business custom, so the contract did not cover or purport to cover every detail of the transaction.

The provision that the contract was to be governed by the laws of California does not exclude the application of the federal Maritime Lien Act for the very obvious reasons that "The legislation of Congress is a portion of the law of each state, identical in each," Restatement: Conflict of Laws, Chap. 1, sec. 2, p. 5; that the laws of the United States are the supreme law of the land, United States Constitution, Art. VI; and that the Maritime Lien Act superseded (46

U.S.C. 975) the California law of maritime liens, thus becoming the California law.

This case is not like *The President Arthur*, 279 U. S. 564, where the supplier had contracted that the owner should pay for the coal by trade acceptances at the time of delivery. To have held that a lien arose under such a circumstance would have been to permit an implied provision that the supply was on the credit of the vessel to override the express provision of the agreement that it was to be "paid for" by the acceptances. As the owner was, in this court's own language, to "pay for" the coal by trade acceptances, the coal was paid for when the acceptances were given. When paid for, the debt was extinguished and there was no basis for a lien.

Petitioners make much of the statement of this court in *Piedmont & George's Creek Coal Co. v. Seaboard Fisheries Co.*, 254 U. S. 1, that a maritime lien could arise only if a pledge of the ship's credit was necessary.

This court in that case was considering whether supplying for use in both factories and vessels to an owner, who later appropriated a portion of the coal to certain vessels, was supplying to the vessels, holding that it was not. The statement must be interpreted in the light of the problem before the court. The coal was not supplied for vessels. It was supplied for the buyer's general use in factories and vessels. What this court undoubtedly meant was that in such a case there could have been no credit extended the vessel because the vessel was not primarily involved. This court certainly did not mean that no lien arises un-

less the supplier proves that, but for the credit of the vessel, he would not have supplied. Such a holding would destroy the presumption of the Maritime Lien Law that the supply was on the credit of the vessel.

Contracts similar to the one in this case were involved in *The Portland* (C.C.A. 9) 273 Fed. 401, and *The Golden Gate*, 52 F. (2d) 397, but were not particularly discussed by the court, although in *The Portland* the court stated that appellant put special stress upon the fact that there was a general contract between libelant and the charterer.

In *The Everosa* (C.C.A. 1) 93 F. (2d) 732, there was an almost identical contract, which the District Court held (18 F. Supp. 186, 190) negatived a sale on the credit of the vessel because it contained no provision for a lien on the vessel. The District Court decision was reversed by the Circuit Court of Appeals without mention of the contract.

Undoubtedly neither Circuit Court of Appeals considered, in view of the presumption under the Maritime Lien Act, that a general contract to supply overcame the presumption—relying on the credit of the orderer not being inconsistent with reliance on the credit of the vessel as well.

The Eastern Shore (D.C.Md.) 24 F. (2d) 443;
The A. S. Sherman (D.C.N.D.N.Y.) 51 F. (2d) 782;
The Astorian (C.C.A. 9) 57 F. (2d) 85;
The El Amigo (C.C.A. 5) 285 Fed. 868;
The Henry S. (D.C.E.D. Va.) 4 F. Supp. 953;

and cases herein cited.

CONCLUSION

Respondent therefore respectfully submits that the charter parties in these cases did not withhold from the charterer authority to bind the vessels, that maritime liens arose, that they were not waived by the standing contract, and that the decree of the Circuit Court of Appeals and the decrees of the District Court be affirmed with interest and costs as therein decreed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 662.—October Term, 1939.

Dampskibsselskabet Dannebrog, Claimant of the Motorship "Stjerneborg", et al., Petitioners, *vs.* Signal Oil and Gas Company of California.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[May 20, 1940.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

The question is whether the respondent is entitled to maritime liens for fuel oil delivered to petitioners' vessels.

In September, 1932, respondent, Signal Oil and Gas Company, made a contract with the Anglo Canadian Shipping Company, Limited, agreeing to sell fuel oil to any vessel which the Anglo Canadian Company might own, charter or operate. In May, 1933, the parties modified the contract so as to include the fuel oil requirements of vessels owned, chartered or operated by W. L. Comyn & Sons. Later, the respective owners of the two vessels here in question, the "Stjerneborg" and the "Brand", chartered them to W. L. Comyn & Sons.

The charters were time charters on the so-called "Government form". The owners agreed "to let" and the charterers "to hire" the vessel "from the time of delivery" for a specified period, the vessel to be placed "at the disposal of the charterers" at such place as the charterers may direct, being on her delivery ready to receive cargo and to be employed in carrying merchandise as stated. The owners agreed to provide and pay for all provisions, wages and shipping and discharging fees of the captain, officers, engineers, firemen and crew; to pay for the insurance of the vessel, and to maintain her in a thoroughly efficient state in hull, machinery and equipment. The charterers agreed to "provide and pay for" coals and fuel oil, port charges, pilotages, etc., and all other usual expenses except as before stated. The charterers were to pay "for the

use and hire" of the vessel a stipulated amount commencing "on and from the day of her delivery" and to continue until "the day of her redelivery in like good order and condition, ordinary wear and tear excepted, to the owners (unless lost) at a safe port" as designated. It was provided that the captain, although appointed by the owners, should be "under the orders and direction of the charterers as regards employment or agency"; and the charterers were to load, stow and trim the cargo at their expense under the supervision of the captain. If the charterers should have reason to be dissatisfied with the conduct of the captain, officers or engineers, the owners if necessary should make a change in the appointments. The charterers were allowed to appoint a supercargo to accompany the vessel and "see that voyages are prosecuted with the utmost despatch". It was further provided that nothing in the charter should be construed as a "demise" and that the owners were to remain responsible for the navigation of the vessel. The charters contained no prohibition against the creation of liens for necessary supplies ordered by the charterers.

Respondent libeled the vessels for fuel oil supplied to the vessels respectively on the charterers' order, and the owners appeared and filed answers alleging that the oil was furnished upon the charterers' credit and not upon that of the vessel.

The District Court sustained the liens (25 Fed. Supp. 594) and the Circuit Court of Appeals affirmed the decrees. 106 F. (2d) 896. Because of an alleged conflict with decisions of the Circuit Court of Appeals of the Fifth Circuit in *The Cratheus*, 263 Fed. 693, and *Pensacola Steamship Company* v. *United States Shipping Board*, 277 Fed. 889, certiorari was granted. February 26, 1940.

The Circuit Court of Appeals in the instant case followed its decisions in *The Portland*, 273 Fed. 401, and *The Golden Gate*, 52 F. (2d) 397. *The Golden Gate* was a case of a time charter which required the charterer to provide and pay for fuel oil but contained no provision denying the right of the charterer to bind the ship for necessary supplies. The court said that in the absence of such a prohibition the ship was bound whether the supplies were ordered by the charterer or by the master. The ruling was reiterated by the same court in *The Ludden*, 66 F. (2d) 997, 998. In further support of its position, respondent cites the following cases from other circuits: *The Everosa*, C. C. A. 1st, 93 F. (2d) 732, 735;

The J. W. Hennessy, C. C. A. 2d, 57 F. (2d) 77, 79, 80; *The Annie E. Morse*, C. C. A. 3d, 286 Fed. 794, 798; *Munson Inland Water Lines* v. *Seidl*, C. C. A. 7th, 71 F. (2d) 791, 793.

Petitioners rely upon our decisions in *The Kate*, 164 U. S. 464, and *The Valencia*, 165 U. S. 264, to the effect that where the charter party requires the charterer to provide and pay for supplies, the supplier being charged with knowledge of the provisions of the charter party was not entitled to a maritime lien for supplies furnished to the vessel upon the order of the charterer.

These decisions, however, were prior to the passage of the Act of June 23, 1910, 36 Stat. 604, which governs the present case. The text of the Act, as amended, is set forth in the margin.[1] Its purpose was to simplify and clarify the rules as to maritime liens as to which there had been much confusion. The Act did away with the artificial distinction between repairs, supplies, etc., furnished in home ports and those furnished in foreign ports. It did away with the doctrine that when the owner of a vessel contracted in person for necessaries or was present in the port when they were ordered, it was presumed that the material man did not intend to rely upon the vessel's credit. It substituted a federal statute for numerous state

[1] The Act of June 23, 1910, 36 Stat. 604, as amended by the Act of June 5, 1920, § 30, 41 Stat. 1005, 46 U. S. C. 971-973, provides:

"§971. *Persons entitled to lien.* Any person furnishing repairs, supplies, towage, use of dry dock or marine railway, or other necessaries, to any vessel, whether foreign or domestic, upon the order of the owner of such vessel, or of a person authorized by the owner, shall have a maritime lien on the vessel, which may be enforced by suit in rem, and it shall not be necessary to allege or prove that credit was given to the vessel.

"§ 972. *Persons authorized to procure repairs, supplies, and necessaries.* The following persons shall be presumed to have authority from the owner to procure repairs, supplies, towage, use of dry dock or marine railway, and other necessaries for the vessel: The managing owner, ship's husband, master, or any person to whom the management of the vessel at the port of supply is intrusted. No person tortiously or unlawfully in possession or charge of a vessel shall have authority to bind the vessel.

"§ 973. *Notice to person furnishing repairs, supplies, and necessaries.* The officers and agents of a vessel specified in section 972, shall be taken to include such officers and agents when appointed by a charterer, by an owner pro hac vice, or by an agreed purchaser in possession of the vessel; but nothing in this chapter shall be construed to confer a lien when the furnisher knew, or by exercise of reasonable diligence could have ascertained, that because of the terms of a charter party, agreement for sale of the vessel, or for any other reason, the person ordering the repairs, supplies, or other necessaries was without authority to bind the vessel therefor".

Other provisions, §§ 974 and 975, relate to the waiver of liens and the superseding of state laws.

statutes purporting to confer liens. *Piedmont Coal Company* v. *Seaboard Fisheries Company*, 254 U. S. 1, 11.[2]

In so doing, the statute provided a series of simple and comprehensive rules. While it was said not to be intended to change the general principles of the law of maritime liens,[3] it was intended to operate in aid of those who supply necessaries to ships and it correspondingly restricted the rights of the owners of the vessels. Any person furnishing repairs, supplies, etc., to a vessel whether foreign or domestic, "upon the order of the owner" or "of a person authorized by the owner", is to have a maritime lien which may be enforced by suit *in rem*. It is not necessary to allege or prove that credit was given to the vessel. The "managing owner, ship's husband, master, or any person to whom the management of the vessel at the port of supply is intrusted", is presumed to have authority to procure the necessaries. The officers and agents thus specified include those appointed "by a charterer, by an owner *pro hac vice*, or by an agreed purchaser in possession of the vessel". These broad provisions are then subjected to the qualification that nothing in the Act should be construed to confer a lien "when the furnisher knew, or by exercise of reasonable diligence could have ascertained, that because of the terms of a charter party, agreement for sale of the vessel, or for any other reason, the person ordering the repairs, supplies, or other necessaries was without authority to bind the vessel therefor".

Despite the aim thus to provide simple and clear rules, there has been no little contrariety of opinion in the application of the statute,—well illustrated by the conflicting decisions to which we have referred with respect to the existence of maritime liens where supplies have been ordered by a charterer who has agreed with the owner to provide and pay for them. As, in such a case, the supplies are furnished on the charterer's order, there is no question that the supplier is charged with knowledge of the provisions of the charter when he either knows them or by reasonable diligence could have ascertained them. So far the principle of *The Kate* and *The Valencia*, *supra*, is embodied in the statute. But it does not fol-

[2] See, also, The Yankee, 233 Fed. 919, 924; The Oceana, 244 Fed. 80, 82; Senate Report, No. 831, 61st Cong., 2d sess.; House Report, No. 772, 61st Cong., 2d sess.

[3] Senate Report, No. 831, 61st Cong., 1st sess. Marshall & Co. v. "President Arthur", 279 U. S. 564, 568.

lo[illegible] that, in the light of the statute, *The Kate* and *The Valencia* can st[illegible] be regarded as authority for the view that the mere fact that the charterer is bound to provide and pay for the supplies excludes the supplier from having a maritime lien when the charter party contains no prohibition against its creation.

We think that our decision in *The South Coast*, 251 U. S. 519,[4] negatives such a conclusion. That was a case of a bare-boat charter which provided that the charterer should pay for all supplies and all other charges and save the owner harmless from all liens. The supplies were ordered by the master, but, though appointed by the owner, the master was under the orders of the charterer and thus the master's orders were the charterer's orders. When the supplies were ordered, representatives of the owner at the port of supply warned the supplier that the vessel was under charter and that he must not furnish the supplies on the credit of the vessel. If the owner had power to prevent the attaching of a lien by this warning, the owner had done so. But while under the terms of the charter party if was clearly the duty of the charterer to provide and pay for the supplies and to save the owner harmless, this was held not to preclude the creation of a maritime lien. *The Kate* and *The Valencia* were cited unavailingly. When the charter party was examined to see if it prohibited liens it was found that it did not do so; it recognized the possibility of liens. It provided that the owner might retake the vessel in case of the failure of the charterer to discharge within thirty days any debt which was a lien upon it and also for a surrender of the vessel free of liens upon the charterer's failure to make certain payments.

We think that the fair import of our decision in *The South Coast* is that when the charterer has the direction and control of the vessel and it is his business to provide necessary supplies, and the charter party does not prohibit the creation of a maritime lien therefor, the material-man is entitled to furnish the supplies upon the credit of the vessel as well as upon that of the charterer and the lien is not defeated by the fact that the charterer has promised the owner to pay.

When, however, the charter party, with knowledge of which the material-man is charged, prohibits the creation of a lien for sup-

[4] The facts are more fully set forth in the opinion of the Circuit Court of Appeals. The South Coast, 247 Fed. 84.

plies ordered by the charterer or the charterer's representative, no lien will attach. This was decided in *United States* v. *Carver*, 260 U. S. 482. That was a case of vessels owned by the United States. The charterer, whose representative had ordered the supplies, had agreed that it would "not suffer nor permit any lien" which might have priority over the title and interest of the owner. The question was whether a maritime lien would have arisen against the vessels if they had been privately owned. The court, quoting the provision of the Act of 1910 as to the duty of the material-man to make inquiry, said that he was not entitled "to rest upon presumptions until he is put upon inquiry"; he must inquire. "If by investigation with reasonable diligence the material-man could have found out that the vessel was under charter, he was chargeable with notice that there was a charter; if in the same way he could have found out its terms he was chargeable with notice of its terms". The court added that there would have been no difficulty in finding out both. The court found a difference between the language of the charter party in the *Carver* case and that used in *The South Coast*. In the *Carver* case "the primary undertaking" was that "a lien shall not be imposed". The lien was denied, not because the charterer was bound to provide and pay for supplies but because the charter party prohibited the lien. To the same effect is the decision in the case of the *St. John's*. *Colonial Beach Company* v. *Quemahoning Coal Company*, 260 U. S. 707.

As, in the instant case, the charter parties contained no provision prohibiting the creation of a maritime lien, we are of the opinion that the mere fact that they required the charterers to provide and pay for the supplies did not prevent the liens from attaching.

The argument is pressed that respondent was under a general contract to supply "the fuel oil requirements of any and all vessels owned, chartered, or operated" by W. L. Comyn & Sons. But this contract did not provide that the oil should be supplied on the sole credit of Comyn as the owner or charterer of the vessels or negative the creation of maritime liens for supplies actually furnished to the vessels in satisfying their requirements. The decisions which petitioner cites are not apposite. In *Piedmont Coal Company* v. *Seaboard Fisheries Company, supra*, the Coal Company had made a contract with a corporation, which owned both steamers and factories, to furnish such coal as should be required. The court ob-

served that the difficulty which confronted the Coal Company in seeking to enforce a maritime lien did not lie in the fact that a contract had been made for the supply of coal. "A vessel", said the court, "may be liable *in rem* for supplies, although the owner can be made liable therefor *in personam:* since the dealer may rely upon the credit of both". So, the court recognized that if in that case "the coal had been furnished to the several vessels by the libellant, maritime liens would have arisen and could have been established under the statute without proof that credit was given to the vessels". The difficulty which blocked recovery by the Coal Company was "solely that it did not furnish coal to the vessels". There "was no understanding when the contract was made, or when the coal was delivered by the libellant, that any part of it was for any particular vessel or even for the vessels then composing the fleet. And it was clearly understood that the purchasing corporation would apply part of the coal to a non-maritime use". *Id.*, pp. 10, 11, 13. In the instant case, the oil was supplied exclusively for the vessels in question, was delivered directly to the vessels and was so invoiced; and there was nothing in the general contract to the effect that the supplies were to be furnished upon the exclusive credit of W. L. Conyn & Sons and not also upon the credit of the vessels.

In the other case relied upon, *Marshall & Company* v. *"President Arthur"*, 279 U. S. 564, the point was that the maritime lien had been waived by the libellant under an agreement by which trade acceptances, endorsed by designated persons had been received; that "by taking other and different security, upon which it relied, and which it still retains, without stipulating for the retention of the lien, it has waived the lien which it otherwise would have had". *Id.*, p. 572. It may be noted that in the instant case there was a contention that the liens had been waived by the respondent by entering into a certain creditor's agreement and by accepting certain security. But it appeared that in those transactions the right to the liens on the vessels had been expressly reserved. The court below accordingly ruled that there had been no waiver and its decision in that relation has not been challenged here.

There remains the contention that, apart from any prohibition of the creation of liens, the vessels could not be bound for supplies ordered by the charterers because of the nature of the charter parties. There is a plain distinction between a case of a bare-boat

charter, where the charterer mans the vessel, and a case where the charter party is a mere contract for the carriage of goods. In the former there is a clear demise; in the latter, the charterer is in substance only a shipper.[5] There is an intermediate class of charters which has given rise to many questions in various situations. Time charters of the sort now before us are in this class. The owner provides the master and crew and undertakes the navigation of the vessel and to maintain her in an efficient condition. But the master although appointed by the owner, is placed "under the orders and direction of the charterers as regards employment or agency". The owners agree "to let" the vessel and the charterers "to hire" her "from the time of delivery" until the date set for "her re-delivery". The charterers are to provide and pay for fuel supplies, port charges, pilotages, etc. and all other expenses except those pertaining to the captain, officers or crew.

There is thus a distribution of responsibility, and liability or the legal consequences of particular conduct would be determined accordingly. While the owners assumed responsibility for the navigation of the vessels and their maintenance in an efficient state, we are not concerned with any questions relating to faults in navigation or failure in maintenance. The mere fact that the owners furnished the master and crew cannot be regarded as decisive of the question before us. *See United States* v. *Shea*, 152 U. S. 178, 190, 191; *United States* v. *Carnell Steamboat Company*, 267 U. S. 281. Aside from the navigation of the vessels, they were placed under the control of the charterers and the master and crew were under their directions. The vessels by the terms of the charters were delivered to the charterers, and where the vessels were to go, and what they were to carry, within the broad limits described in the charters, were determined by the charterers.

The question whether under a charter, containing these or similar provisions, the material-man may have a lien for supplies furnished on the order of the charterer has given rise to conflicting views[6] and no little confusion has resulted.

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[5] See Reed v. United States, 11 Wall. 591, 606; Leary v. United States, 14 Wall. 607, 610; United States v. Shea, 152 U. S. 178, 189-191; The Barnstable, 181 U. S. 464, 468.

[6] See, e. g., upholding the lien: The India, 14 Fed. 476, 16 Fed. 262; The Bombay, 38 Fed. 512, 863; The George Dumois, 68 Fed. 926; The Anna E. Morse, 286 Fed. 794; The A. S. Sherman, 51 F. (2d) 782; The Golden Gate, 52 F. (2d) 397; The Eyerosa, 93 F. (2d) 732. See, e.g., *contra*: The Cratheus

We think that this conflict may be resolved by having due regard to the manifest purpose of the governing statute. The Act says nothing about types of charters. In speaking of those who shall be presumed to have authority to procure supplies, the statute expressly includes not only the "ship's husband" and the "master" but "any person to whom the management of the vessel at the port of supply is intrusted", and these persons are to be taken to include such officers and agents "when appointed by a charterer, by an owner *pro hac vice*, or by an agreed purchaser in possession of the vessel". We think that the purpose of the statute is not properly served by construing the term "management of the vessel" as referring to her "navigation". Management is a broader term connoting direction and control for the purposes for which the vessel is used. Where as in this case, apart from mere navigation, the vessel is placed under the direction and control of the charterer as the hirer of the vessel, who as such may determine to what port she shall go and what she shall carry, subject only to specified exceptions, we think the charterer must be deemed to be intrusted with the vessel's management for the purpose of applying the statutory test of authority to obtain necessary supplies upon the credit of the vessel, in the absence of a provision to the contrary.

The origin of the maritime lien is the need of the ship. *Piedmont Coal Company* v. *Seaboard Fisheries Company, supra.* The lien is given for supplies which are necessary to keep the ship going. The material-man when furnishing such supplies on the order of the charterer is charged with knowledge of the terms of the charter party when he can ascertain them, but when it appears that by these terms the charterer has direction and control of the vessel and that he is the one to obtain the essential supplies, and that there is no prohibition of the creation of a maritime lien, the material-man is protected by the terms of the statute. He furnishes the supplies on the order of the person authorized to obtain them and he is entitled to rely on the credit of the vessel as well as upon the credit of the one who gives the order.

We are of the opinion that it would thwart the purpose of the statute to compel the material-man furnishing supplies to the vessel

263 Fed. 693; Pensacola Steamship Co. v. U. S. Shipping Board, 277 Fed. 889; The Thordis, 290 Fed. 255; The Ville de Djibouti, 295 Fed. 869; The Pajala, 7 F. Supp. 618; The Dictator, 18 F. (2d) 131. Compare, The J. W. Hennessy, 57 F. (2d) 77, 80.

to resolve the ambiguities which may be found in such charters as those here involved. The statute was intended to afford the material-man a reasonably certain criterion. The owner has a simple and ready means of protection. All that it is necessary for him to do, as the material-man in dealing with the charterer is charged with notice of the charter, is to provide therein that the creation of maritime liens is prohibited. When the owner does not do so, he should not be heard to complain when it appears that it is the charterer's business to obtain supplies to keep the vessel on her way and the charter has not prohibited reliance upon the credit of the vessel.

The judgment of the Circuit Court of Appeals is affirmed.

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.